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No. 90-1328
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

Supreme Court, U.S.
FILED
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GRAFF TRUCKING COMPANY, INC.,

Petitioners,

v.

FRANK J. KELLEY, Attorney General of the State of Michigan; WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission; STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission; RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission; and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

I

WHETHER THE COURTS BELOW LAWFULLY AND PROPERLY APPLIED THE YOUNGER ABSTENTION DOCTRINE TO THIS CASE WHERE THERE IS A VITAL STATE INTEREST INVOLVED AND A PENDING STATE PROCEEDING WILL ADEQUATELY RESOLVE THE ISSUES RAISED IN THE PETITION.

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STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Michigan Motor Carrier Act, 1933 P.A. 254, as amended, M.C.L. 475.1 et seq; M.S.A. 22.531 et seq, (specifically M.C.L. 479.10a(6); M.S.A. 22.575(1)), 1909 P.A. 300, as amended, M.C.L. 462.26; M.S.A. 22.45 and the Interstate Commerce Act, 49 U.S.C. § 10521(b).

STATEMENT OF THE CASE

This case concerns a Michigan statutory provision enacted under Michigan's police powers to promote the health, safety, and welfare of the general public. The specific provision at issue is aimed at promoting the safety, accountability and economic fitness of trucking companies and truck drivers by requiring that when trucks are operated under a lease in Michigan, they shall be

operated only by persons who are employees of the motor carrier.[1]

Since at least January, 1986, Petitioner Graff Trucking Co., Inc. ("Graff") has failed to bring its intrastate leases into compliance with 10a(6). On January 7, 1986, Graff first received written notice of these violations and on July 1, 1988, an officer of the Michigan State Police Motor Carrier Enforcement Division ("SP/MCD") directed Graff to bring its operations into compliance. On April 19, 1989 and May 1, 1989, the SP/MCD conducted follow-up investigations of Graff and determined that Graff was still not complying with 10a(6). On

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[1]M.C.L. 479.10a(6); M.S.A. 22.575(1) ["10a(6)"], of the Michigan Motor Carrier Act, 1933 P.A. 254, as amended.

May 4, 1989, the SP/MCD served Graff with 14 citations based on hundreds of alleged violations of 10a(6).[2]

During its investigation, the SP/MCD also contacted the Michigan Public Service Commission ("MPSC") Staff Motor Carrier Compliance Section ("MPSC Staff") and notified them of the results of their investigation and that citations were issued. Based on these alleged violations, the MPSC Staff on May 22, 1989, initiated a formal administrative complaint proceeding (MPSC File No. T-1075) against Graff at the MPSC alleg-

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[2]Although these citations were subsequently dismissed by order of the 3rd District Court, St. Joseph, Michigan (Pet App 18a-19a), that dismissal took place after the district court below had issued its abstention order.

ing violations of 10a(6).[3]

The MPSC complaint proceeding is a common approach taken by the MPSC Staff when it learns of extensive violations of Michigan's Motor Carrier Act, and provides Graff with formal contested case procedures to permit the presentation of facts, legal issues, and defenses con-

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[3]Pursuant to the MPSC Rules of Practice and Procedure, Mich. Ad. Code R. 460.31 et seq (1968) and §14 of the Motor Carrier Act, M.C.L. 479.14; M.S.A. 22.579, a party may file a formal complaint against a motor carrier for alleged violations of the Act.

cerning the matters raised in this case.[4]

Following the April investigation by the SP/MCD, Graff filed a Complaint in Federal District Court, Western District of Michigan seeking a declaration that 10a(6) was unconstitutional.[5] Respon-

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[4]An MPSC contested hearing concerning 10a(6) and the factual issues involving Graff has been completed and comprises 1,700 pages of transcript, 172 exhibits and briefs totalling over 400 pages of text. A 66-page Proposal for Decision by the Administrative Law Judge assigned to hear the case was issued on March 6, 1991 finding Graff to be in violation of 10a(6) and recommending various remedies. Graff and all other parties can now appeal this PFD to the MPSC itself pursuant to M.C.L. 24.201; M.S.A. 3.560(101) and M.C.L. 24.281; M.S.A. 3.560(181). Under Section 26, 1909 P.A. 300, as amended, M.C.L. 462.26; M.S.A. 22.45, parties may then seek judicial review by right, and injunctive relief, from the MPSC's final order in the Michigan courts.

[5]Graff v. Frank J. Kelley, et al., U.S.D.C. No. L-89-30043-CA.

dents' Motion to Dismiss on grounds of abstention was granted by the court on August 18, 1989 pursuant to an Opinion and Judgment Dismissing Complaint [Pet App 3a-8a]. The court subsequently denied Graff's Motion for Rehearing pursuant to an Opinion and Order dated October 16, 1989 [Pet App 9a-11a)]. On August 31, 1990, the panel of the Sixth Circuit affirmed the district court decision [Pet App 1a-2a]. Graff then filed a petition for rehearing which was denied pursuant to order dated November 19, 1990 [Pet App 14a].

SUMMARY OF ARGUMENT

The decisions of the court of appeals and the district court below are supported by several decisions of this Court recognizing the appropriateness of fed-

eral court abstention in the circumstances presented. The decisions below clearly do not conflict with decisions of this Court or of other U.S. Circuit Courts of Appeal. Thus, further review by this Court is not warranted.

All of the criteria supporting abstention and requiring exhaustion of state remedies exist in this case. Graff has raised both state and federal constitutional claims predicated on application of Michigan's Motor Carrier Act. However, it has not given the MPSC, the agency having extensive experience in administering the Michigan Motor Carrier Act, or the state appeals court assigned the duty to review all final MPSC orders appealed, the opportunity to decide any of these issues. Since motor carrier

regulation by the state is complex and pervasive, the policy problems involved here transcend this case as any judgment rendered will apply equally to others. An administrative proceeding concerning the issues in this case is nearing completion. A clear and swift path to judicial review of any formal MPSC order concerning all issues in this case, based upon the evidentiary record, is guaranteed by right under state law, specifically M.C.L. 462.26.

Thus, this case is well suited for application of the abstention and exhaustion of remedies doctrines as undertaken by the lower federal courts.

ARGUMENT

A. The Decisions Below Properly Found That Younger Abstention Was Appropriate in this Case.

1. The Younger Doctrine.

The decisions below held that the abstention doctrine originating in Younger v. Harris, 401 U.S. 37 (1971), applies to this case.[6] Although Younger involved a state criminal proceeding, the abstention principle has been extended to state civil and administrative proceedings in which important state interests are involved.[7]

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[6]In Younger, this Court found that unless bad faith or harassment was present, principles of federalism require dismissal of a request for equitable relief based on federal issues.

[7]Trainor v. Hernandez, 431 U.S. 434 (1977); Huffman v. Pursue Ltd., 420 U.S. 592 (1975); Ohio Civil Rights Comm. v. Dayton Christian Schools, 477 U.S. 619 (1986).

Subsequent decisions interpreting Younger have held that interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state proceedings that concern important state interests. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 on remand Midkiff v. Tom, 740 F.2d 15 (1984).[8]

Finally, as conceded by Graff in its petition, the Younger doctrine is not

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[8]The respect for state processes included in the notion of "comity", and which underlie the Younger abstention doctrine, precludes any presumption that state courts will not safeguard federal constitutional rights. See Middlesex County Ethics Committee v. Garden State Bar Assoc., 457 U.S. 423 on remand 684 F.2d 801 (1982). The Supreme Court's reasoning in the Middlesex case should dispose of any claims by Graff that the MPSC or state appeals court are not adequate forums for Graff's federal constitutional claims.

limited to instances where state proceedings are pending on the day the federal case is filed, but also applies where state proceedings are begun against a federal plaintiff after the federal complaint is filed but before any proceedings of substance on the merits have occurred in the federal court. Hicks v. Miranda, 422 U.S. 332 (1975).

Petitioner's claims were fully presented to the district court below, and it proceeded to properly apply the three-prong Younger abstention test established in Parker v. Commonwealth of Kentucky, Board of Dentistry, 818 F.2d 504 (6th

Cir. 1987).[9] The district court found all three Parker requirements satisfied.[10]

The decisions below properly concluded that: Michigan has a clear and unequivocal interest in the regulation of

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[9]The Parker absention test requires as follows: "First, the Court must determine whether state proceedings are pending. Second, the state proceedings must involve an important state interest. Third, the Court must determine whether the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims." 818 F.2d at 508.

[10]The first part was met primarily because of the MPSC proceeding, and also because of the state district court proceeding. The Michigan legislature satisfied the second item by passing the Michigan Motor Carrier Act, including the section contested by Petitioner, to protect the health, safety and welfare of its citizens. The third portion of the test was met because Petitioner Graff can "raise its constitutional claims in the state proceedings and may appeal any MPSC order to the state court of appeals." Opinion, p. 4. [Pet App 7a].

motor carriers; the MPSC is much better able to formulate a record, gather facts and then decide whether Graff has violated the relevant statute; the constitutionality of the questioned statute would only arise after a determination was made that Graff violated it; an adverse decision could be appealed and even enjoined by the appropriate state court; and finally, all the issues, including federal and state constitutional questions, can be readily addressed by the state courts.

Therefore, the decisions below properly determined that Younger abstention was appropriate especially since Graff has state remedies which it may utilize and the matter is presently being

litigated before the MPSC.[11]

2. The Pullman Doctrine.

The abstention doctrine established in Railroad Comm of Texas v. Pullman Co,

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[11]Graff's federal district court complaint sought declaratory relief with regard to the application of a state statute administered by the MPSC. Section 63 of the Michigan Administrative Procedures Act, M.C.L. 24.263; M.S.A. 3.560(163), provides a reasonable state administrative remedy for obtaining such declaratory relief. Thereafter, the party may appeal the administrative agency's ruling to the appropriate court in the manner provided by the Michigan statutes, principally Section 26, supra. Graff ignored this reasonable administrative remedy, and attempted to obtain a declaration from the federal district court striking down the Michigan statute without first seeking the Commission's declaratory ruling. In addition to available state remedies to seek declaratory rulings, Graff also has been participating in the nearly completed MPSC proceeding relating to the issues in this case. Graff can then appeal any MPSC order by right to the Michigan Court of Appeals, pursuant to M.C.L. 462.26; M.S.A. 22.45 and obtain a court ruling on all state and federal constitutional issues presented, with the aid of the MPSC evidentiary record which has now been compiled.

312 U.S. 496 (1941), also justifies the decisions below.[12] Under the Pullman abstention doctrine, when a state law is challenged in federal court as unconstitutional and questions of state law exist which may dispose of the case, a federal court should abstain and allow the state courts or state administrative process to decide.

3. The Burford Doctrine.

The abstention doctrine established in Burford v. Sun Oil Co., 319 U.S. 496,

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[12]Pullman involved an order issued by the Texas Railroad Commission requiring a conductor to operate sleeping cars on railroad lines within the state of Texas. Plaintiffs alleged that the Texas order violated the Equal Protection Clause, Due Process Clause and Commerce Clause of the U.S. Constitution. In ordering the district court to abstain while the parties sought a state ruling on the state issues, the Court relied on notions of comity, discretion and restraint.

reh. den., 320 U.S. 214 (1943), also justifies the decisions below.[13] This Court and other federal courts have consistently applied the Burford doctrine.

B. M.C.L. 479.10a(6), in Conjunction with the Michigan Motor Carrier Act, Involves a Vital State Interest.

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[13]The Burford Court held that the federal district court should have dismissed the complaint in a case involving proration orders regarding Texas oil fields, on the ground that the issues involved a specialized aspect of a complicated regulatory system of local law, which should be left to the local administrative bodies and courts. In this case, there is a complex state regulatory scheme which would be disrupted if federal court review was permitted. Michigan has promulgated pervasive legislation regarding the conduct of motor carriers comprised of some 90 statutory provisions with diverse and widespread purposes. In addition, Michigan has promulgated extensive Motor Carrier Rules (Mich. Ad. Code R. 460.18101 et seq (1988), a Motor Carrier Safety Act (1963 P.A. 181, M.C.L. 480.11 et seq; M.S.A. 9.1666(1) et seq) and extensive Motor Carrier Safety Rules (Mich. Ad. Code R. 460.16101 et seq (1982)).

In this and other proceedings, Graff has argued that 10a(6) does not involve a vital state interest because only Michigan has such a requirement and neither the ICC nor any of the other 49 states have a similar requirement.[14] However, prior to having filed its Sixth Circuit brief opposing rehearing, Respondents obtained a copy of a United States Department of Transportation ("U.S.D.O.T.") report to Congress dated September 30, 1990 indicating that there was a similar employer/employee requirement in several states other than Michigan.[15] Subsequent research indicates

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[14]In its Petition, Graff has finally, yet reluctantly, conceded, that other states also have an employer/employee requirement similar to 10a(6).

[15]Pages 37-38 of this U.S.D.O.T. report to Congress indicated that New York, Texas, Pennsylvania, Virgina and West Virginia all had requirements that owner-operators be employees of a carrier.

that several additional states do, in fact, have a requirement similar to 10a(6).[16]

Similar employer/employee provisions in other states no doubt exist because there is a legitimate public policy basis for states to require that leased equipment only be operated by employees of the carrier or individuals over whom the carrier exercises substantial control. The purpose of 10a(6), and other similar leasing provisions is to ensure direct responsibility between the carrier (and drivers) to the affected public. The regulated carrier is more financially able to account to the public than the

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[16]These states include Georgia, Louisiana, Massachusetts, Rhode Island, South Carolina, South Dakota, and Washington.

individual independent contractor. With 10a(6) in place, a motor carrier of property for hire in Michigan using leased equipment has the same liability responsibilities as a like carrier using its own equipment with payrolled drivers. Thus, the legislative intent in enacting 10a(6) was to advance public safety.

By virtue of 10a(6), all for-hire carriers, operating in intrastate commerce, bear public liability without the necessity of judicial determination of driver status. As a requisite to receipt of a MPSC certificate of authority for carriers to transport property for-hire in leased equipment, motor carriers must utilize driver-employees. Under the common law, the driver status was determined <u>after the fact</u>. Section

10a(6) determines driver status before the fact and makes the driver a "statutory" employee. Thus, a negligent act of a driver in Michigan is the negligent act of the carrier. No longer may the carrier disavow the driver.

Graff's argument that the lack of any such requirement on an interstate level somehow preempts the ability of a state to impose such a requirement for intrastate transportation also ignores the effect and intent of the Interstate Commerce Act.[17] Moreover, Graff's argument is meritless because Michigan's regulation applies only to intrastate

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[17]The Interstate Commerce Act, 49 U.S.C. § 10521(b), specifically recognizes and reserves the exclusive right of the states to regulate the operations of motor carriers engaged in intrastate commerce.

transportation, not interstate, and does not burden interstate transportation in any manner.

Additionally, in determining the vital state interest associated with 10a(6), and other provisions of the Michigan Motor Carrier Act, the Act must be viewed as a whole and not analyzed piecemeal because 10a(6) is merely a sub-section of one section of the Act. Graff obtains significant benefits under Michigan's Motor Carrier Act for purposes of intrastate transportation, and should not be permitted to escape reasonable responsibilities also imposed by the same Act.

C. The Decision Not to Appeal the Legally Deficient State District Court Orders, Finding 10a(6) to be Unenforceable Against Graff and ABC Cartage, does not Evidence "Younger" Bad Faith by Respondents, Warranting Certiorari, Because the Panel Below Correctly Recognized that such Appeals Would not Promote a Resolution to this Controversy and Because the Panel's Affirmance of the District Court's Abstention Order was Based not on the State District Court Proceedings, but Instead on the MPSC Proceeding Which is Ongoing and Which will Lead to a Final Resolution.

In its Petition, Graff argues that Respondents have engaged in Younger bad faith by continuing to enforce 10a(6) against Graff after certain state district courts held that provision to be unconstitutional based on federal

grounds[18]. While Respondents did rely somewhat on the state district court proceeding involving Graff in support of their Motion for Abstention, clearly the primary basis for abstention was the pending MPSC complaint proceeding filed against Graff on May 22, 1989.[19] It is important to note in this regard that it is the MPSC which has the most extensive

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[18]Graff references three state district court proceedings, People v. Graff Trucking Indiana Div., 3rd District Court, Case No. 89-1137-1-ST, Order dated 6/25/90 (Pet App 18a-19a); People v. ABC Cartage, 52nd District Court, Case No. 89-002118, order dated 5/15/90 (Pet App 26a-27a), and People v. CTX Division of Central Transport, 34th District Court, Case No. 88-816850, order dated 3/22/89 (Pet App 23a-25a).

[19]Respondents argued that the federal court should abstain so that the MPSC would be able to hear this case, develop a full evidentiary record and issue an order from which Graff would have an automatic appeal of right in the Michigan Court of Appeals.

responsibility and experience in administering the Motor Carrier Act and the most sophisticated contested case procedures for properly noticing the issues to the whole motor carrier industry and for formulating a proper evidentiary record upon which the issues can be resolved either by the MPSC or the state appeals court.

Additionally, as clearly conceded by Graff in its petition, Respondents, commencing with the filing of the complaint against Graff, ceased enforcement of 10a(6) against existing operations of motor carriers. Thus, for carriers, like Graff, who currently are violating 10a(6), Respondents have chosen to not take any enforcement action until the conclusion of the MPSC proceeding involv-

ing Graff and possibly any court of appeals review thereof. Respondents have taken this approach to obtain a comprehensive resolution to the issues presented, despite the fact that it would not be an act of bad faith to continue enforcement of a statutory provision that has been in effect for over 30 years; that has not been declared unlawful or unconstitutional by the MPSC, a Michigan appellate court or any federal court; and where no injunction against enforcement has ever been granted.

What Graff is really complaining about is the fact that it cannot add to its operations by filing leases for additional equipment which do not comply with 10a(6). Clearly, Respondents have acted in good faith by ceasing enforcement

against existing operations until resolution of the issues in this case by the MPSC and state courts. Respondents by their current practice, have thus preserved the status quo on existing operations, but have not agreed to exacerbate 10a(6) situations by receiving additional leases for expanded operations which do not comply with 10a(6).

Graff also argues that it was bad faith for Respondents not to have appealed any of the three Michigan district court rulings relating to 10a(6), even though it was the local state prosecutor and not the Respondents who represented the State's interest in those cases. While the local prosecutor or perhaps the non-party Attorney General could have sought to appeal the State

district court decisions to the appropriate Michigan circuit court, both the district court and the circuit court orders would be limited in their force and effect to the Defendant carrier itself (i.e. Graff, ABC, CTX) and to the jurisdictional boundaries of these courts. While either party could thereafter have sought an appeal in the Michigan Court of Appeals, this would be an appeal "by leave" rather than "of right" and thus there would be no guarantee that the Michigan Court of Appeals would hear the case.[20]

On the other hand, following the MPSC order, the appeal "of right" lies directly in the Michigan Court of Appeals

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[20]MCR (Michigan Court Rule) 7.203(B)(2).

pursuant to M.C.L. 462.26; M.S.A. 22.45. Moreover, both the MPSC and court of appeals orders would have statewide force affecting not only Graff, but all other motor carriers operating in Michigan. In addition, the MPSC proceeding permits proper notice to all potentially affected motor carriers and the ability to formulate a complete evidentiary record applicable to the factual and legal issues presented. Therefore, it was not bad faith for Respondents not to have appealed these state district court

decisions.[21]

Moreover, the state district court rulings are deficient for purposes of ultimately resolving this controversy. For example, the Michigan district court decision involving Graff is based entirely on a Motion to Dismiss and supporting arguments submitted by Graff in that case. The prosecuting attorney representing the state's interest, was

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[21]Both Judge Gibson in his two district court orders, and the Sixth Circuit panel in their opinion and order were cognizant of the substantial advantages and fairness inherent in the MPSC proceeding and thus determined that there would be absolutely no prejudice whatsoever to Graff in having this matter litigated pursuant to MPSC and state court of appeals review. Nevertheless, both Judge Gibson and the panel did expressly indicate that Graff would have the right to return to federal district court if the MPSC, in conjunction with the Michigan Court of Appeals, did not adequately redress Graff's concerns.

totally unfamiliar with motor carrier law, filed no response on the merits (except for a pro-forma answer), and at the oral hearing that took place on June 20, 1990, did not respond nor object to Graff's Motion to Dismiss. No evidentiary hearing was held and no written opinion was ever issued by the state district court. The court's order (Pet App 18a-19a) was prepared by counsel for Graff and merely signed by the Judge after the fact. In other words, this district court proceeding is not a case where a competent court, following development of a full evidentiary record and submission of briefs from both parties, issued an informed and reasoned opinion and order. It would, therefore, not have contributed to resolution of this issue for the Attorney General to

attempt to step in on behalf of the state prosecutor and appeal any of these district court orders. It is much more logical, instead, to go forward with the MPSC proceeding which is based on a thorough and extensive evidentiary record.

Furthermore, neither the circuit court nor the court of appeals (even if leave was granted) would be capable of issuing a well-reasoned or informed decision based on any appeal of the Michigan district court proceedings referenced by

Graff.[22] Finally, Respondents seek to avoid a situation where one district court judge dismisses citations based upon instantaneous summary rulings of other district court judges, as occurred in the district court proceeding involv-

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[22]Even if the Michigan district court proceeding involving Graff had involved a response on the merits by the prosecutor and an informed and well-reasoned opinion of the judge, that would merely be one district court judge's opinion out of 249 sitting district court judges in 125 separate district courts/divisions located throughout Michigan, all of whom may interpret this statute differently. It is merely to avoid this potentially overwhelming multiplicity of suits that the Respondents have chosen to proceed in the complaint proceeding pending at the MPSC after which Graff would have an appeal of right in the Michigan Court of Appeals. Moreover, the MPSC having primary jurisdiction responsibility, and expertise relative to the Motor Carrier Act should be the body to initially hear and decide relevant legal or factual issues presented.

ing Graff.[23]

Petitioner also argues that the MPSC Staff's motivation in filing the formal complaint against Graff at the MPSC was "to avoid a federal court determination of Graff's Commerce Clause and Supremacy Clause issues," and thus was "bad faith." Although Mr. Thomas Lonergan, head of the MPSC Motor Carrier Staff, testified that he felt the MPSC would be a "better forum in which to present the factual issues" involved in the Graff case, he also testified that the hundreds of alleged violations by Graff would normally warrant the filing of a formal complaint by Staff

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[23]During his oral argument to Judge McManus in the Michigan district court proceeding, counsel for Graff cited the district court's decision in People v ABC Cartage, which Judge McManus relied on in dismissing the citations.

in any event, especially where two years of correspondence and warnings had failed to bring Graff into compliance.

The Court must also understand the reason why MPSC review of this matter is so critical. 10a(6) requires that when a motor carrier is utilizing leased equipment in Michigan intrastate commerce, that equipment be operated by an employee. Up until 1977, the MPSC had never examined 10a(6) in order to determine exactly what was necessary for compliance with this employer/employee requirement. In that year, however, the Commission issued an order In Re: American Motor Lines, File No. L-8484 (Order dated 7/11/77) adopting the position that compliance with this employer/employee provision required that carriers

withhold taxes and make proper deductions from an owner-operator's wages when operating in intrastate commerce.

It is this particular MPSC interpretation of the employer/employee requirement, rather than the statute itself, that Graff, ABC Cartage, CTX and Universal Am-Can have objected to in various state and federal court proceedings beginning in 1988. The reason for this is that these carriers wish to treat their owner-operators as independent contractors rather than employees so as to avoid the additional payroll expenses of withholding taxes, etc., some of which involve costly administrative expenses and matching contributions by the carrier. Had the Commission, in the American Motor Lines case, interpreted

the employer/employee requirement to require something other than withholding of taxes, etc., these carriers would not now, nor ever have objected to this provision, on constitutional or any other grounds.

In its brief submitted to the ALJ and the MPSC in the MPSC complaint proceeding against Graff, the MPSC Staff has proposed that the Commission reexamine its order in American Motor Lines. The MPSC Staff has proposed that the Commission could, if it so chose, rely on other criteria for determining compliance with the employer/employee requirement that did not involve withholding of taxes, etc.[24]

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[24]In his Proposal for Decision dated March 6, 1991, the ALJ did not recommend adopting a new test, however, the MPSC and/or the Court of Appeals, on review, may find a new test to be appropriate.

Should the Commission decide that withholding of taxes etc. would no longer be required as necessary for compliance with 10a(6), then the entire issue would likely be resolved and mooted. And this would be done without the need for any Court of Appeals review of the MPSC order.[25]

D. The MPSC in Conjunction with the State Courts can Decide the Constitutional Questions in this Case.

Graff continues its relentless attack of the MPSC proceeding based on the

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[25]Of course, the Commission could also decide to merely reaffirm its Order in American Motor Lines and continue to require the withholding of taxes, etc. for compliance with 10a(6), as was recommended by the ALJ, in which case Graff would still have its appeal of right in the Michigan Court of Appeals, wherein it could present its constitutional and other attacks on continued enforcement of this provision.

MPSC's recognized inability to declare its enabling statute unconstitutional.[26] In response, Respondents submit that the MPSC, regardless of whether it has the power to declare 10a(6) unconstitutional, clearly does have the power to declare it valid and enforceable. The MPSC also has the most accessible and sophisticated procedures to ensure proper notice, and use of other contested case procedures, to develop a proper evidentiary record upon which both constitutional and other attendant legal or factual issues can be resolved. Graff is also guaranteed the right to present its legal issues, including those involving the constitutionality of 10a(6), upon appeal of the

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[26]Graff cites In Re: Central Transport, Inc., MPSC File No. C-6714, #60 (Order dated 1/9/90).

MPSC order to the Michigan Court of Appeals.

As noted previously, the proceeding pending against Graff at the MPSC is the first MPSC proceding which involves a review on the merits of all the facts and arguments concerning the validity of 10a(6). On May 28, 1991, this case will be submitted to the MPSC for ultimate decision. Even if the Commission does not rule upon Graff's constitutional claims, Graff would not be prejudiced in light of its statutory right to seek judicial review of the Commission's order. This Court has previously held that the fact that a state agency would not consider constitutional claims did not preclude Younger abstention where the constitutional claims could be presented

on review in state court.[27]

E. M.C.L. 479.10a(6) does not Impose an Unconstitutional Burden on Interstate Commerce.

Graff argues that 10a(6) violates the Commerce Clause by analogizing 10a(6) with other state statutes which this Court struck down as being a burden on interstate commerce.[28] However, a critical difference exists between those cases and the instant proceeding. In those cases, a state imposed restrictions on a motor carrier operating in interstate

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[27]Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

[28]Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Kassel v. Consolidated Freightways, 450 U.S. 662 (1981).

commerce as that motor carrier passed through the state. In order to avoid a potential of 50 non-uniform requirements for carriers engaged in interstate commerce, this Court struck down those state laws. However, 10a(6) does not apply to interstate transportation, but only to intrastate transportation. Thus, if a carrier transports a shipment from Wisconsin to Ohio through Michigan, then no requirement exists that the carrier comply with 10a(6). Graff's arguments on the issue are thus wholly inapplicable to this case.

RELIEF REQUESTED

Respondents respectfully request that this Honorable Court deny Graff's Petition for Writ of Certiorari.

Respectfully submitted,

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